IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1089

RKO GENERAL, INC.,

Petitioner,

v.

MULTI-STATE COMMUNICATIONS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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February 8, 1979

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OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. It appears as Appendix A in the Petition for Writ of Certiorari. The opinion of the Federal Communications Commission is reported at 61 F.C.C.2d 1062 (1976), and appears as Appendix B in the Petition. The Commission's decision denying reconsideration is reported at 64 F.C.C.2d 869 (1977), and appears as Appendix C in the Petition. The Partial Initial Decision

of the Administrative Law Judge is reported at 61 F.C.C.2d 1070 (1974), and appears as Appendix D in the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on October 4, 1978. A petition for rehearing and suggestion for rehearing *en banc* by Petitioner was denied on November 30, 1978. The jurisdiction of this Court has been invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly exercised its function of judicial review of an administrative action (1) in determining that a bank letter provided "reasonable assurance" under Federal Communications Commission case law and policy that an application for a permit to construct a television station had the requisite financing, and (2) by remanding the case to the Federal Communications Commission for further proceedings in light of that determination.

STATUTES INVOLVED

Sections 307(a), 308(b), and 309(a) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § § 307(a), 308(b), 309(a), and Section 10 of the Administrative Procedure Act, 60 Stat. 237, as amended, 5 U.S.C. § 706. These statutes appear as Appendix E to the Petition.

STATEMENT OF THE CASE

On May 1, 1972, Respondent, Multi-State Communications, Inc. ("Multi-State"), filed an application with the Federal Communications Commission ("Commis-

sion") for a permit to construct a television station on Channel 9, New York City. This application was mutually exclusive with the license renewal application for Station WOR-TV on the same channel, filed by Petitioner, RKO General, Inc. ("RKO").

To satisfy the Commission's requirement that an applicant for a new television station demonstrate with "reasonable assurance" that it is financially able to construct and operate the station, Respondent included in its application a letter from the Chase Manhattan Bank ("Chase"), signed by Mr. Kaye Jones, a bank official. In its letter the bank stated that it was willing to lend Respondent up to $4,000,000.00 provided primarily that Respondent's application was approved by the Commission and once such approval had been received, that Respondent meet all the ordinary and reasonable credit criteria of Chase and would request, at that time, a formal lending commitment. The bank also noted in the letter that it is personally and favorably acquainted with several of Respondent's stockholders and, as a condition of its intent to finance Respondent, that it was depending on the continued participation of substantially all of the stockholders named in the Respondent's application or substitute stockholders acceptable to Chase.

The bank letter to Respondent was accepted by the Commission as satisfying the "reasonable assurance" requirement that an applicant be financially qualified to construct and operate a broadcast station. This acceptance was subject to a hearing on Respondent's ability to meet any collateral requirement if there were such a requirement. As a result of a deposition taken by Petitioner of Jones, the Chase official who had signed the letter, an issue was designated in the case to determine

the general availability of the Chase $4,000,000.00 loan to Respondent.

A hearing on this issue was held before an Administrative Law Judge ("ALJ"). Jones testified that Chase did not consider the letter a final and binding commitment.[1] He also testified that the bank stood upon the letter as written and that the conditions written into the letter only became operative after the grant of Respondent's application by the Commission. Jones testified that any additional information on Respondent would not be required until Respondent requested the loan after grant of the application of Respondent. As part of his testimony Jones acknowledged that the expression of willingness and intent to lend the money to Respondent was ". . . a still subsisting position of Chase Manhattan Bank."

The Administrative Law Judge in his Partial Initial Decision acknowledged that the Commission accepted the Chase bank letter as constituting "reasonable assurance" that the money would be available to Respondent, but that the testimony of Jones indicated that Respondent had failed to demonstrate the requisite degree of "reasonable assurance" that the bank loan would be available. Based on that testimony the Administrative Law Judge found Respondent financially disqualified.

Respondent appealed to the Commission which upheld the decision of the Administrative Law Judge. Respondent's petition for reconsideration was denied by the Commission.

Petitioner's application for renewal was granted subject to the resolution of issues designated against it in the

[1] A binding commitment is not required by the Commission. "Reasonable assurance" that the loan will be available is all that is required.

Order designating for hearing the application of Petitioner and Respondent. The designated issues relate to alleged anticompetitive practices, violation of the sponsorship identification provisions of Section 317 of the Communications Act of 1934, as amended, and allegations of misrepresentation of facts, concealment of facts and lack of candor on the part of officers, employees and/or former employees during the course of another Federal Communications Commission proceeding.

Respondent appealed to the United States Court of Appeals for the District of Columbia Circuit with Petitioner participating as Intervenor. After the filing of briefs, oral argument and a review of the transcript of the entire testimony of Jones,[2] the Court of Appeals reversed the Commission, stating that the record evidence did not support the Commission's holding that Respondent had failed to establish its financial qualifications to be a licensee and that the bank letter satisfied the Commission's requirement of "reasonable assurance" that the loan would be available. Accordingly, the court below ruled that the bank letter complied with the Commission's own standard. The court remanded the case to the Commission on that basis. Petitioner, RKO, as Intervenor, petitioned for rehearing in the court below and suggested rehearing *en banc* which was denied by the court. Appellee below, Federal Communications Commission, did not request rehearing or suggest rehearing *en banc*.

[2] On July 10, 1978, the Clerk of the Court of Appeals requested and received on July 12 from the Commission copies of the transcript in the proceedings including (Vol. 4), the entire testimony of the bank official. See Appendix A.

ARGUMENT

The petition in this case presents an administrative law case in which the Court of Appeals applied the proper standard of judicial review and there is no occasion for further review by this Court. Petitioner is proceeding in this case on a false premise; namely, that the Court of Appeals substituted its own evaluation of the evidence in the case for the evaluation of the Federal Communications Commission. As clearly shown, the court having reviewed the entire record pursuant to the applicable requirements of the Administrative Procedure Act, 5 U.S.C. Section 706, was unable to find the requisite evidence necessary to support the "substantial evidence" requirement of the Administrative Procedure Act and therefore reversed the Federal Communications Commission.

Petitioner contends (page 6), that in the decision below the court has disregarded the limitations on judicial review of administrative agencies established by the Administrative Procedure Act and previous decisions of this Court. It contends that the court committed the same interventionist errors present in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978). What Petitioner fails to comprehend is that its so-called limitations on judicial review are not applicable in the instant case. It has overlooked the fact that in both of the cases cited above the primary matter of concern to the court was rulemaking procedures of Government agencies. In such agency rulemaking cases a different standard is applied as this Court cogently noted in *FCC v. National Citizens Commission for Broadcasting, supra*, wherein it stated (at pp. 801-803):

> "We agree with the Court of Appeals that regulations promulgated after informal rulemaking, while not subject to review under the 'substantial evidence' test of the APA, 5 U.S.C. § 706(2)(E), quoted in n. 21, *supra*, may be invalidated by a reviewing court under the 'arbitrary or capricious' standard if they are not rational and based on consideration of the relevant factors. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-416, S.Ct. 814, 822-823, 28 L.Ed.2d 136 (1971)."

In the instant case, as shown below, the court correctly applied the "substantial evidence" test to be utilized in adjudicatory matters and as a result of the application of this test properly reversed the Commission.

In reaching its decision the Appeals Court carefully observed the requirements of the Administrative Procedure Act, 5 U.S.C. § 706(2)(E), applicable to this type of case. The court likewise adhered to the mandate of this Court delineated in its decisions in cases properly applicable to a case of this type. [See *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951), and *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. ___, 98 S.Ct. 3463 (1978)].

The error in Petitioner's interpretation of the reviewing court's action is obvious. As stated above, its argument is based solely on its claim that the court substituted its evaluation of the evidence for that of the Commission. Quite the contrary. As required by the applicable provisions of the Administrative Procedures Act and the mandate of this Court, as delineated in relevant cases, the court below, in applying the required "substantial evidence" test, canvassed the record to determine whether the evidence relied on by the Commission provided the

substantial support required for the Commission's decision. It was unable to find this required "substantial evidence." As noted in its Opinion (Petitioner's Appendix 5a):

> "After carefully scrutinizing Jones' testimony and the remainder of the evidence, we are of the opinion that the record evidence does not support the Commission's holding that Multi-State failed to establish its financial qualifications to be a licensee."

The correct procedure to be followed by the reviewing courts in cases such as this was clearly spelled out by this Court in *Universal Camera Corp. v. N.L.R.B., supra*, and recently reiterated in the latest of its progeny, *Beth Israel Hospital v. N.L.R.B., supra.* In *Universal Camera Corp. v. N.L.R.B., supra*, this Court went to great lengths in tracing the Congressional intent and the legislative history of the Administrative Procedures Act as it applies to the scope of judicial review. It pointed out that the Court of Appeals was not completely bound by decisions of Federal agencies. The intent of Congress was made quite clear as to the scope of review required by the Court of Appeals in dealing with the review of decisions of Federal agencies such as the National Labor Relations Board. It noted (at 466):

> "Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside

> when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

In the instant case the Court of Appeals properly exercised its conventional judicial function. It took the affirmative action required by both the Administrative Procedures Act and the decisions of this Court. While affording full respect to the Commission's findings, it reviewed the entire record and found lacking the substantial evidence necessary to support the Commission's findings. It could do no less than reverse the Commission on this record. Simply stated, the court reviewed the Chase bank letter and the testimony of Jones in its entirety. The court could not find the substantial evidence necessary to support the Commission's findings that the Chase letter did not satisfy the Commission's requirements for such letters.

For these reasons, which are stated in its Opinion, the court remanded the case to the Commission with the instructions that Respondent cannot be regarded as disqualified for financial reasons on the basis of the bank letter. Petitioner attempts to stretch these instructions into something more. On pages 12-13 of its Petition, it incorrectly states:

> "In ruling that the Commission must hold that the loan would be available to Multi-State notwithstanding the bank's reservations, the court of appeals in effect has forbidden the Commission from requiring applicants to demonstrate their financial qualifications prior to receiving a construction permit."

This simply is not the case. In its opinion, the Court of Appeals merely stated that Respondent's letter satisfied the requirements of previous Commission policy and case law on the sufficiency of such letters. Contrary to Petitioner's claim, the court has not usurped the authority of the Commission granted by Congress in determining the financial qualifications of its applicants. The Communications Act of 1934, as amended, Section 307(a), 308(b) and 309(a) has not been disturbed by the ruling of the Court of Appeals.

Accordingly, there is no occasion for this Court to grant the petition in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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(202) 296-5151
Attorney for Respondent

February 8, 1979

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

July 10, 1978

Thomas R. King, Jr., Esquire
Office of the General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Appeal No. 77-1400—*Multi-State Communications, Inc. v. FCC*

Dear Mr. King:

Confirming our telephone conversation today, it will be appreciated if you would arrange for the delivery to the Court of a transcript of the proceedings in this case before the administrative law judge. It is hoped that this transcript can be delivered to the Court within the next day or so.

Thank you for your anticipated cooperation.

Very truly yours,

/s/ George A. Fisher
Clerk

GAF/plk

cc: Joseph M. Morrisey, Esquire
Harold D. Cohen, Esquire

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Washington, D.C. 20001

July 12, 1978

Thomas R. King, Jr., Esquire
Office of the General Counsel
FEderal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Appeal No. 77-1440—*Multi-State Communications, Inc. v. FCC*

Dear Mr. King:

The purpose of this letter is to acknowledge receipt of certain documents which you delivered to my office today in response to my request made on July 10. The documents received today are as follows:

(1) Undesignated volume in Docket No. 19992
(2) Vol. 2 in Docket No. 19992
(3) Vol. 4 in Docket No. 19991
(4) Vol. 5 " " " "
(5) Vol. 6 " " " "
(6) Vol. 7 " " " "

It is my understanding that the transcript of the proceedings before the A.L.J. begin in volume 4 and continue through volume 7, totalling 129 pages.

Thank you for your assistance in this matter.

Very truly yours,

/s/ George A. Fisher
Clerk

GAF/plk

cc: Joseph Morrissey, Esquire
Harold D. Cohen, Esquire